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No. 606

IN THE

# Supreme Court of the United States,

OCTOBER TERM, 1930.

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THE UNITED STATES OF AMERICA,
*Appellant,*

v.

WILLIAM H. SPRAGUE and WILLIAM J. HOWEY.

---

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

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## BRIEF SUBMITTED BY JEREMIAH M. EVARTS, ESQ., *AMICUS CURIAE.*

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JEREMIAH M. EVARTS,
*Amicus Curiae.*

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# INDEX OF POINTS.


PAGE

Statement ..... 1

Question ..... 2

Summary of Argument ..... 2

I. The sovereign power of the People of the United States. State and Nation are each the servant and agent of the People ..... 3

A. The Nation and Its Source of Power ..... 3

1. The intention of the framers of the Constitution to create a republican form of government, one in which the people retained sovereignty, is clearly expressed throughout the proceedings leading up to the adoption of the Constitution ..... 3

2. The Supreme Court of the United States has construed the Constitution and declared that the nation and its government were created of the people, by the people and for the people ..... 6

3. The people of the United States for generations have believed in this conception of government of the people, by the people, and for the people ..... 8

B. The State and Its Source of Power ..... 9

II. The Amending Power ..... 11

A. Article V of the Constitution ..... 11

The Power of Selection Is a Power Delegated to the United States by Article V of the Constitution, *But*, the Power of Adoption Is Not a Power Delegated to the United States by Article V of the Constitution ..... 11

B. The Preamble and the X Amendment ..... 15

III. The People of the United States of America, in the exercise of their sovereign power, have the sole power to change the form of government and the right to exercise that power ..... 21

Conclusion ..... 24

## Index of Authorities.

PAGE

Cohens v. Virginia, 6 Wheat. 264 ..... 16, 19, 23
Declaration of Independence ..... 2
Elliot's Debates ..... 3, 4, 5, 21
Farrand, Records of the Federal Convention ..... 4
Federalist ..... 5, 21-22
Gibbons v. Ogden, 9 Wheat. 1 ..... 14, 17
Hawke v. Smith, No. 1, 253 U. S. 221 ..... 19
Kansas v. Colorado, 206 U. S. 46 ..... 6, 7, 12, 16, 17, 21
Leser v. Garnett, 258 U. S. 130, 136 ..... 19
Marbury v. Madison, 1 Cranch 137 ..... 6, 18
McCulloch v. Maryland, 4 Wheat. 316 .. 6, 9, 12, 15, 18, 20, 22
United States v. Sprague and Howey, unreported decision ..... 11
Webster, Reply to Hayne ..... 9, 10

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## Statement.

The brief here presented as *amicus curiae* does not touch upon the question of *stare decisis*. That question is treated in counsel's brief. It does not consider the effect of the argument upon amendments to the Constitution, other than the XVIII, as that question is likewise fully considered in counsel's brief. Nor will this brief go exhaustively into the history of the adoption of the Constitution and the history of the X Amendment, which matters are fully treated in counsel's brief.

It is sought here to present what is regarded as the fundamental question in the case and to deal with that question alone.

## Question.

Is the XVIII Amendment of the Constitution of the United States unconstitutional for the reason that an amendment of such a character under the Constitution of the United States could only be adopted by the people of three-quarters of the several states in constitutional convention assembled?

## Summary of Argument.

The contention here presented is: That the People of the United States in the exercise of their sovereign power adopted their Constitution and thereby created their Nation and its government; that the People granted to that Nation and its government certain limited powers over themselves and their rights; that under the Preamble of the Constitution and the X Amendment thereto, the People of the United States alone can make a further grant of power over themselves and their rights to the Federal Government, their agent and servant.

It is respectfully submitted that the question in this case involves the fundamentals of law and government in this nation. It involves the great principles of political liberty set forth in the Declaration of Independence as follows:

> "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. *That to secure these Rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. That whenever any Form of Government becomes destructive of these ends, it is the right of the People to alter or abolish it, and to institute new Government, laying its foundations on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.*"*

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* NOTE. Italics used in this brief are the writer's.

## I.

## The sovereign power of the People of the United States. State and Nation are each the servant and agent of the People.

### A. The Nation and Its Source of Power.

It is unnecessary to elaborate on the conditions surrounding the confederation of the States. It was merely a compact between the states, destructible at will by the states. The necessity of forming a more perfect union became apparent to all. We are interested here solely with the nature of the government by which that more perfect union was effected.

In order to solve the question of the nature of the new government obviously it is necessary to examine the expressed intention of the framers of the Constitution and the government created thereby.

**1. The intention of the framers of the Constitution to create a republican form of government, one in which the people retained sovereignty, is clearly expressed throughout the proceedings leading up to the adoption of the Constitution.**

The People of the United States were recognized as the sole source of power.

Wilson of Pennsylvania said:

> "But I return to my general reasoning. My position is, sir, that, in this country, the supreme, absolute and uncontrollable power resides in the people at large; they have vested certain proportions of this power in the state governments; but that the fee simple continues resides, and remains with the body of the people."
>
> (2 Elliot's Debates, 457-458.)

Pinckney of South Carolina said:

> "For a people thus situated is a government to be formed * * * a people who have the justest opinion of their civil and religious rights, and who have risked everything in asserting and defending them.
>
> "In every government there necessarily exists a power from which there is no appeal, and which, for that reason, may be termed absolute and uncontrollable.
>
> "The person or assembly in whom this power resides is called the sovereign or supreme power of the state. With us, the sovereignty of the Union is in the People."
>
> (4 Ell. Deb. 328.)

The People alone could grant power to this new nation of *their* creation. That fact was recognized.

> "Col. Mason considered a reference of the plan to the authority of the people as one of the most important and essential of the Resolutions. The Legislatures have no power to ratify it. They are the mere creatures of the State Constitutions, and cannot be greater than their creators. And he knew of no power in any of the Constitutions, he knew there was no power in some of them, that could be competent to this object. Whither then must we resort? To the people with whom all power remains that has not been given up in the Constitutions derived from them. *It was of great moment he observed that this doctrine should be cherished as the basis of free government.* Another strong reason was that admitting the Legislatures to have a competent authority, it would be wrong to refer the plan to them, because succeeding Legislatures having equal authority could undo the acts of their predecessors: and the National Government would stand in each State on the weak and tottering foundation of an Act of Assembly."
>
> 2 Farrand, Records of the Federal Convention, 88-90.

The intention to create the Nation and its Government as their agent and servant is nowhere better expressed than in the Preamble of the Constitution which reads as follows:

> "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic tranquillity, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."

Therein is stated the nature of the government intended, the source of the power granted, and the purposes for which the nation and its government was created. To the framers of the Constitution those words were not superfluous. They had a very definite meaning. As Hamilton said, in arguing against the necessity of any express reservation of the rights of the People:

> "Here, in strictness, the people *surrender nothing;* and as they *retain everything* they have no need of particular reservations. 'We the people of the United States, to secure the blessings of liberty to ourselves and our posterity do *ordain* and *establish* this Constitution for the United States of America'! This is a better recognition of popular rights than volumes of those aphorisms which make the principal figure in several of our State Bills of Rights."
>
> The Federalist Cap. LXXXIV.

The framers of the Constitution did not believe that the instrument which they had created for the purpose of giving birth to a new nation robbed the people of their sovereign power. As Wilson well said in the Pennsylvania convention:

> "The late Convention were assembled to devise some plan for the security, safety and happiness of the people of the United States. If they have devised a plan that robs them of their power, and constitute an aristocracy, they are the parricides of their country and ought to be punished as such."
>
> 2 Elliot's Debates, 523.

**2. The Supreme Court of the United States has construed the Constitution and declared that the nation and its government were created of the people, by the people and for the people.**

That proposition was definitely declared by Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316, 403-404:

> "From these Conventions the constitution derives its whole authority. The government proceeds directly from the people; is 'ordained and established' in the name of the people; and is declared to be ordained, 'in order to form a more perfect union, establish justice, ensure domestic tranquillity, and secure the blessings of liberty to themselves and to their posterity.' * * *
>
> "But when, 'in order to form a more perfect union', it was deemed necessary to change this alliance into an effective government, possessing great and sovereign powers, and acting directly on the people, the necessity of referring it to the people, and of deriving its powers directly from them, was felt and acknowledged by all.
>
> "The government of the Union, then (whatever may be the influence of this fact on the case), is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit."

The powers so granted by the people to the government of *their* creation were held by the court to be limited powers. In *Marbury* v. *Madison*, 1 Cranch, 137, 176, the Court said:

> "To what purposes are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed."

And as late as 1906 these doctrines were reaffirmed in *Kansas* v. *Colorado*, 206 U. S. 46, 88-90, as follows:

"The proposition that there are legislative powers affecting the Nation as a whole which belong to, although not expressed in the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. That this is such a government clearly appears from the Constitution, independently of the Amendments, for otherwise there would be an instrument granting certain specified things made operative to grant other and distinct things. This natural construction of the original body of the Constitution is made absolutely certain by the Tenth Amendment. This amendment, which was seemingly adopted with prescience of just such contention as the present, disclosed the widespread fear that the National Government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that if in the future powers seemed necessary they should be granted by the people in the manner they had provided for amending that act. It reads: 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.' The argument of counsel ignores the principal factor in this article, to-wit, 'The people'. Its principal purpose was not the distribution of power between the United States and the States, but a reservation to the people of all powers not granted. The preamble of the Constitution declares who framed it, 'We, the people of the United States', not the people of one State, but the people of all the States, and Article X reserves to the people of all the States the powers not delegated to the United States. The powers affecting the internal affairs of the States not granted to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, and all powers of a national character which are not delegated to the National Government by the Constitution are reserved to the people of the United States."

Only one conclusion can be drawn from these cases. The people created *their* nation and its form of government. All

powers granted to the national government were derived *from the people* as the *sole* source of sovereign power. The powers so granted were *limited* powers to be exercised directly on the people and for their benefit. Did the people grant to any other servant and agent of *their* creation the power to confer additional power over the people and their rights to this other agent and servant of their creation, the national government?

**3. The people of the United States for generations have believed in this conception of government of the people, by the people, and for the people.**

This fact is apparent. Generations have studied and believed the principles of sovereignty and government laid down by Jefferson, Marshall, Webster and Lincoln. As Lincoln declared, one generation fought the Civil War in order that "government of the people, by the people, for the people, shall not perish from the earth".

The writer's generation fought in another war thirteen years ago. The rallying cry of that war was "The War to save Democracy".

May one ignore the cause for which this nation was created, the cause for which generations fought and died! Words are scarcely necessary to emphasize a fact which has been written with the blood of the People of this Nation.

Therefore, the question now is: Have the people of the United States acted under a *misconception* of the form of government which they conferred upon this servant and agent of *their* creation? Have the people conferred upon their other agents and servants, the State Governments, the power to grant additional powers over the people and their rights, without the consent of the people, to their other agent and servant, the national government?

## B. The State and Its Source of Power.

The People of the United States are not only citizens of the United States but also citizens of their respective states. In the latter capacity the citizens of the States created another agent and servant, the State. The Nation and its government was created for one purpose. The State and its government was created for another purpose. Its power was likewise derived from the People. The People of the State established the State for the purpose of *exercising local self government*. The prevailing desire for local self government is well expressed in these words of Marshall:

> "Would the people of any one State trust those of another with the power to control the most insignificant operations of their State Government? We know they would not."
>
> *McCulloch* vs. *State of Maryland*, 4 Wheat. 316, 431.

The State government and its legislature were the servants of the people. As such the state had no power to transfer the power derived from its citizens to another sovereignty.

> "The powers delegated to the State sovereignties were to be exercised by themselves, not by a distinct and independent sovereignty, created by themselves."
>
> *McCulloch* vs. *State of Maryland*, 4 Wheat. 316, 404.

The State as the servant of the people had no power to destroy that other servant of the people, the National government. As Daniel Webster stated the proposition in the Reply to Hayne:

> "And now, sir, I repeat, how is it that a State legislature acquires any power to interfere? Who, or what, gives them the right to say to the people, 'We, who are your agents and servants for one purpose, will undertake to decide, that your other agents and servants, appointed by you for another purpose, have transcended

> the authority you gave them!' The reply would be, I think not impertinent, 'Who made you a judge over another's servants? To their own masters they stand or fall'."
>
> Second speech on Foot's Resolution, Works of Daniel Webster, 6th Ed. Vol. 3, p. 335.

The Civil War established the proposition that the State had no power to destroy.

The queston involved in this case is the reverse of the proposition then confronting the people, to wit: Have the States as agents and servants of the people, the power to create without the consent of the people; i. e., the power to confer, without the consent of the people, additional power over the people and their rights to that other agent and servant created by the people, the national government?

It is respectfully submitted: (1) that such power does not exist under the Constitutions of the States; (2) it does not exist under the Constitution of the United States; (3) the existence of such power is contrary to the conception of the form of government intended by the framers of the Constitution; it is contrary to the construction of that instrument by this Court; and it is contrary to the conception of the People of the United States of the form of government created by themselves and which they for generations have believed existed.

## II.

### The Amending Power.

### A. Article V of the Constitution.

**The Power of Selection Is a Power Delegated to the United States by Article V of the Constitution, *But* the Power of Adoption Is Not a Power Delegated to the United States by Article V of the Constitution.**

If the power to create exists in the State Legislatures it can be found only in Article V of the Constitution.

That article reads as follows:

> "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of it's equal Suffrage in the Senate."

It is admitted that the power of selection is delegated to the United States, and that power is the *only* power delegated by this article. The Congress in exercising that power is exercising an administrative and not a legislative function. In the exercise of that administrative function it must use discretion. Its action is subject to review.

*Decision of Judge Clark Below.*

Under the Constitution certain limited powers were granted to the Federal government by the people. All other powers not prohibited to the States were reserved to the States or to the people.

*Kansas* v. *Colorado*, 206 U. S. 46, 89-90.

There are five distinct kinds of Amendments to the Federal Constitution:

1. Amendments which constitute a surrender of power previously granted to the National Government by the people.

2. Amendments which constitute a surrender of power previously granted to the State Government by the people.

3. Amendments constituting an additional grant of power over the people and their rights to the National Government.

4. Amendments regulating powers previously granted, but not increasing powers over the people.

5. Amendments which expressly declare implied limitations on the power of the Government.

In the latter two classes we are not interested.

The first two classes surrender power previously granted. The third class is an additional grant of power over the people, the sole source of any such power. In them sole sovereignty resides, and they alone can part with it.

The Amendment here in question falls in the third class. It is our contention that the power to adopt such an amendment and to grant such additional direct power over the people resides in the people alone, as the sole source of sovereign power.

*McCulloch* v. *Maryland, supra;*
*Kansas* v. *Colorado, supra.*

Congress in the exercise of its administrative power of selection *must* examine the nature of the proposed amendment. If the proposed amendment seeks to create new power in the federal government over the people and their rights, then Congress *must* select the people as having the sole power to adopt and, by their adoption, grant new power over themselves and their rights to their agent and servant.

That, we respectfully submit, is the true meaning of Article V as read in conjunction with the Preamble of the Constitution and the X Amendment.

It may be said that a presumption exists that Congress properly exercised the administrative power of selection. But the *proper* exercise depends solely upon the character of the amendment. The presumption is rebutted in the instant case. The amendment in the instant case obviously attempts to confer additional power over the people and their rights. It was not even intended to be submitted to the people. It was expressly proposed by Congress "to the States."

The government, however, contends that Article V reposes unrestrained arbitrary power in Congress to choose the first of the two alternative methods of ratification provided. And this irrespective of the fact that the proposed amendment grants additional power over the People and their rights to their agent and servant, the national government. Let us examine this contention. The mere fact that two methods of ratification are provided shows some intention to have existed on the part of the framers of the instrument. Otherwise only one method would have been provided. The admission of an intent on the part of the makers of the instrument is as well an admission of purpose, and it is apparent that the two methods of ratification differ. Then it must be true that it was the intent and purpose that one method should be used under one set of circumstances and the other method under a different set of circumstances. To ascertain definitely we must look to the dominant spirit of the instrument, and this is to be found in the Preamble which states the purpose for which and the belief in which the nation was

founded. If Congress had an arbitrary and unrestrained power of selection then the great purposes set forth in the Preamble are at the mercy of Congress and the State Legislatures. Sovereignty ceases to exist in the People *because sovereignty implies the power to exercise it, and the power to exercise would be elsewhere than in the People.* The purposes of the Preamble control. This was true, we believe, originally, but it was subsequently definitely expressed in the Tenth Amendment.

Even before the adoption of the Tenth Amendment Article V was controlled by the Preamble and, therefore, did not in and of itself confer an arbitrary and unrestrained power of selection upon the Congress. As Chief Justice Marshall stated the rule of construction in the great case of *Gibbons* vs. *Ogden:*

> "If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well settled rule that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction. * * * We know of no rule for construing the extent of such powers, other than is given by the language of the instrument which confers them, taken in connection with the purposes for which they were conferred."
>
> *Gibbons* v. *Ogden*, 9 Wheat. 1, 188-189.

We respectfully submit that the government's contention is unsound. It is not in accordance with the rule of construction quoted above. It is not in accordance with the theory of the Constitution and the theory of government created thereby, as construed by this great court for more than a century, intended by its creators, and believed to exist by the People of the United States of America.

Furthermore, if any such arbitrary and unrestrained power of selection *ever* existed, such power was *revoked* by the Tenth Amendment, under which the People retain their sole sovereign power.

## B. The Preamble and the X Amendment.

The Preamble of the Constitution states who framed the Constitution and created this Nation. It reads as follows:

> "We, the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."

The question of law in this case hinges in the last analysis on the meaning of the word "People". As respects the Preamble the meaning of that word has been construed by Chief Justice Marshall in his most famous opinion, *McCulloch* v. *Maryland*, 4 Wheat. 316, 402-403:

> "The Convention which framed the constitution was indeed elected by the State legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligations or pretensions to it. It was reported to the then existing Congress of the United States, with a request that it might be submitted to a Convention of Delegates, chosen in each State *by the People thereof*, under the recommendation of its legislature, for their assent and ratification.' This mode of proceeding was adopted, and by the Convention, by Congress, and by the State Legislatures, *the instrument was submitted to the people. They acted upon it in the only manner in which they can act safely, effectively, and wisely, on such a subject, by assembling in Convention.* It is true, they assembled in their several States—and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass. Of consequence, when they act, they act in their States. *But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the State governments.*"

Again, in the case of *Cohens* v. *Virginia*, 6 Wheat. 264, at the top of page 381, Chief Justice Marshall said:

> "The American people, in conventions of their respective States, adopted the present Constitution."

These quotations show beyond peradventure of a doubt that the Court considered the Constitution to have been adopted by *the People* acting through their duly authorized representatives in Constitutional Conventions assembled. "*The People of the United States*" as that term is used in the Preamble must be those citizens entitled to elect representatives to Constitutional Conventions. It is respectfully submitted that there is no other reasonable construction of the words.

The X Amendment to the Constitution reads as follows:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The words "The People" as used in the X Amendment must mean exactly the same as the words in the Preamble. Such is the only reasonable construction of these words.

Such construction was placed upon these words by this Court in 1906 in the case of *Kansas* v. *Colorado*, where the Court said:

> "The proposition that there are legislative powers affecting the Nation as a whole which belong to, although not expressed in the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. That this is such a government clearly appears from the Constitution, independently of the Amendments, for otherwise there would be an instrument granting certain specified things made operative to grant other and distinct things. This natural construction of the original body of the Constitution is made absolutely certain by the X Amendment. *This amendment, which was seemingly adopted with prescience of just such widespread fear that the National Government*

> *might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that if in the future powers seemed necessary they should be granted by the people in the manner they had provided for amending that act.* It reads: 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.' The argument of counsel ignores the principal factor in this article, to wit, 'the people'. *Its principal purpose was not the distribution of power between the United States and the States, but a reservation to the people of all powers not granted.* The preamble of the Constitution declares who framed it, "We, the people of the 'United States', not the people of one State, but the people of all the States, and Article X reserves to the people of all the States the powers not delegated to the United States. *The powers affecting the internal affairs of the States* not granted to the United States by the Constitution, nor prohibited by it to the States, *are reserved to the States* respectively, *and all powers of a national character which are not delegated to the National Government by the Constitution are reserved to the people of the United States.*"
>
> *Kansas* v. *Colorado*, 206 U. S. 46, 89-90.

The construction of the words "The People" by Chief Justice Marshall in 1819 and by Mr. Justice Brewer speaking for the Court in 1906, is in complete accord with the intention of the framers of the Constitution. It is in complete accord with that conception of government and political liberty in which the People of the United States then, and ever since have believed.

It is respectfully submitted that the V Article of the Constitution *must* be read in conjunction with the Preamble and the X Amendment in accordance with the rule of construction laid down by Chief Justice Marshall in *Gibbons* v. *Ogden*, *supra*. Originally all powers of the Federal government were derived from the People as the sole source of

Sovereign power. *McCulloch* v. *Maryland, supra.* The People granted to that government of their creation limited powers over themselves and their rights. *Marbury* v. *Madison, supra.* What power was *reserved* to the People by the X Amendment, *unless* it was the sole power to grant to their agent and servant which *they* created, additional power over themselves and their rights?

It may be argued that the legislatures in fact represent the People for the purpose of conferring additional power over the People and their rights to the Federal government. Let us examine this argument.

Take for example a representative in the State Legislature of the State of Vermont. He is solely authorized by his constituents to represent them in the Legislature of the State of Vermont as their agent and servant in accordance with the limited powers, granted by the People of that State to that State, and enumerated in the Constitution of that State. There is nothing in that Constitution which authorizes that legislature to create in the Federal government additional power over the people of the State of Vermont and their rights or over the people of any other State. The legislature of a state is not elected for such a purpose. It is elected for other purposes.

For the purpose of argument, let us assume that in March 1931, four months after his election to the Legislature of that State, a proposed amendment to the Constitution of the United States repealing or modifying the First Amendment to the Constitution doing away with the right of free speech, freedom of the press and peaceable assembly, or any other amendment increasing the power of the Federal government over the people, is submitted to the Legislature for adoption. At the time of the election in the fall of 1930 the question of the adoption of such an amendment was not dreamed of by the People of that State. Can anyone say that the Legislature *in fact* represents the People of the State of Vermont for the purpose of adopting such amendment to the Constitution of the United States? We respectfully submit that this question

needs no answer. Can anyone say, that when the legislature of the State of Vermont attempts to grant that additional power over the People of the State of Vermont and their rights to their other agent and servant it does so *with the consent of the people of Vermont?* It is submitted that this question likewise needs no answer. In *Hawke* v. *Smith*, No. 1, 253 U. S. 221, and *Leser* v. *Garnett*, 258 U. S. 130, 136, the Court ruled that a State legislature in ratifying a proposed amendment to the Federal Constitution is performing a Federal function derived from the Federal Constitution, and that, in the exercise of such function, the legislature transcends any limitations sought to be imposed by the People of a State. That ruling necessarily denies any possible *presumption in law* that the Legislature is acting as representative of the People. Therefore, on the proposition stated, *as a matter of fact*, the Legislature of the State of Vermont does not represent the people of that State in adopting such proposed amendment. *As a matter of law* it has not been given authority under the Constitution of that State to grant to the Federal Government additional power over the People and their rights. As a *matter of law* under the ruling in *Hawke* v. *Smith* and *Leser* v. *Barnett*, it does not represent the people of the State of Vermont when it attempts to grant such additional power to the national government over the people of that State and other States in the exercise of a Federal function.

*This Court for a century has construed the Constitution to the effect that all powers of the Federal government were derived from the people as the sole source of sovereign power. The people granted* to their government of *their* creation limited powers over themselves and their rights. The Federal government is *their* agent and servant. What is the purpose of having a written Constitution? As Chief Justice Marshall said in *Cohens* v. *Virginia*, 6 Wheat. 264, at page 387:

> "The Constitution is framed for ages to come, and is designed to approach immortality as nearly as human institutions can approach it. * * * It is exposed to storms

> and tempests, and its framers must be unwise statesmen indeed, if they have not provided it as far as its nature will permit, with the means of self-preservation from the perils it may be destined to encounter."

The Preamble states the purposes to be preserved. The Tenth Amendment provides the means of self preservation.

The Preamble to the Constitution is an expression of the form of government intended and the great purposes for which this nation was created. *McCulloch* v. *Maryland*, *supra*. The People of the United States created *their* nation and defined in *their* Constitution *their* reasons for doing so. The People of the United States declared in the Tenth Amendment that they reserved the powers not delegated to *their* nation and its government. What were those powers unless it was the sole power to grant to *their* agent and servant additional power over themselves and their rights? It is respectfully submitted that the X Amendment was provided as the means of self preservation of the form of government not only intended to be created but held by this Court to have been created. *McCulloch* v. *Maryland*, *supra*; *Kansas* v. *Colorado*, *supra*. It is respectfully submitted that the Tenth Amendment perpetuates the liberties and the sovereign powers of the People of the United States, *for which purpose they adopted the Constitution*. What other reasonable construction of the words "or to the people" in the X Amendment is possible? Does not any other construction render the X Amendment superfluous? It is a first principle of constitutional construction that no part of the Constitution can be disregarded.

*Our* construction of the amending power as limited by the Preamble and the Tenth Amendment perpetuates the fundamental principles of political liberty contained in the Declaration of Independence. It perpetuates for ourselves and our posterity the Blessings of Liberty and the form of government intended by the framers of the Constitution. It perpetuates the construction of the fundamental principles of that great instrument laid down by this Court in 1819 in the case of *McCulloch* v. *Maryland*, 4 Wheat. 316, 403-405; and

again in 1906 in the case of *Kansas* v. *Colorado*, 206 U. S. 46, 89, 90. It perpetuates the Sovereign Power of the People of the United States of America over their agents and servants, both of State and Nation.

## III.

**The People of the United States of America, in the exercise of their sovereign power, have the sole power to change the form of government and the right to exercise that power.**

This case resolves itself into one of two propositions.

FIRST: Under the narrow construction of Article V of the Constitution contended for by the government in this case, the People of the United States conferred upon the Legislatures of the several States the power to adopt unlimited amendments to the Constitution of the United States, granting further power over the people and their rights to that other agent and servant created by the people, the Federal government. That is the Government's proposition! If such be the case, the People of the United States subjected themselves *unwittingly* to the whim and caprice of a bare majority of a quorum in the Legislatures in three-fourths of the several States, such legislatures acting on a question not even submitted to the People for consideration.

It is submitted that if such be the fact, the form of government so created was *unwittingly* created. To repeat the words of Wilson at the Pennsylvania Convention, *supra:*

> "The late Convention were assembled to devise some plan for the security, safety and happiness of the people of the United States. If they have devised a plan that robs them of their power, and constitute an aristocracy, they are the parricides of their country and ought to be punished as such."

We also repeat the words of Hamilton, *supra:*

> "Here, in strictness, the people *surrender nothing;* and as they *retain everything* they have no need of particular reservations. 'We the people of the United States, to secure the blessings of liberty to ourselves and our posterity do *ordain* and *establish* this Constitution for the United States of America.' This is a better recognition of popular rights than volumes of those aphorisms which make the principal figure in several of our State Bills of Rights."

And as Chief Justice Marshall said:

> "Would the people of any one State trust those of another with the power to control the most insignificant operations of their State government? We know they would not."
>
> *McCulloch* v. *Maryland*, 4 Wheat. 316, 431.

How much less would they have trusted a bare majority of a quorum in the legislatures of three-fourths of the States!

Shall we *now* say that Hamilton, Wilson, Madison, Pinckney, and Mason did not know what they were doing, and did not realize the nature of the instrument which they were formulating? In the light of the printed word no such conclusion can be reached. On the contrary we are driven to the conclusion that they not only knew that the Sovereign power rested in the People, but that they *intended* it should *remain* in the People. Therefore the contention of the government in this first proposition *must* fall.

If this Court hold that the People of the United States did in fact create that hated form of government, an oligarchy, then the sole remedy of the people is to amend Article V of the Constitution to provide, that hereafter all amendments to the Federal Constitution conferring additional power to the Federal Government over the People and their rights can only be adopted by the People in constitutional conventions assembled in their respective States. Even such attempt to reform their agent and servant is subject to the

whim and caprice of the agents and servants themselves—both State and Federal!

SECOND: A "government of the people, by the people, for the people" was created under the Constitution of the United States, wherein the people as the sole source of sovereign power, reserved to themselves alone, in the exercise of that sovereign power, the sole power to grant additional power over themselves and their rights to their agent and servant, the Federal Government. There is here created in truth a republican form of government, in which the People retain sovereignty. Under such construction of the nature of the Constitution and such conception of the form of government created thereby, the People *remain* the sole source of sovereign power. It is respectfully submitted that this great Court construed the Constitution to have created a Republican form of government, one in which the people retained their sovereignty. The Preamble and the Tenth Amendment perpetuates that form of government and its principles of political liberty.

Under that form of government and its principles of political liberty the People of the United States *alone* can grant additional power over themselves and their rights to their agent and servant. An attempted exercise of that power by any or all their agents and servants is a usurpation of the Sovereign Power of the People of the United States. The People alone have the power to *change* their form of government. As Chief Justice Marshall said in the great case of *Cohens* v. *Virginia*:

> "The people made the Constitution, and the people can unmake it. It is the creature of their will, and lives only by their will. But this supreme and irresistible power to make or unmake, resides only in the whole body of the people; not in any subdivision of them. The attempt of any of the parts to exercise it is usurpation, and ought to be repelled by those to whom the people have delegated their power of repelling it."

*Cohens* v. *Virginia*, 6 Wheat. 264, 389.

## CONCLUSION.

The question in this case involves the sole source of all power in this nation. It involves the base upon which all law and government in this nation stand. It involves the political liberty of one hundred and twenty million people *and their posterity*. The question is: Did the People of the United States of America, in the exercise of their Sovereign Power, reserve to themselves alone, under the Preamble and the X Amendment to the Constitution, the *sole power to grant to their agent and servant* additional power over themselves and their rights?

It is submitted to this great Court that the People of the United States of America, the Sovereign Power of this Nation, are entitled to the answer of this Court to this question.

Respectfully submitted,

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